

## **EXHIBIT “C”**

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 WHITESTONE CONSTRUCTION CORP.,

4 Plaintiff,

5 v.

20 cv 1006 (GHW)

6 YUANDA USA CORPORATION,

7 Defendant.

Telephone Conference

8 -----x  
9 New York, N.Y.  
December 21, 2020  
11:00 a.m.

10 Before:

11 HON. GREGORY H. WOODS,

12 District Judge

13  
14 APPEARANCES

15 GOETZ FITZPATRICK, LLP  
Attorneys for Plaintiff

16 BY: GARY M. KUSHNER

17 FOX SWIBEL LEVIN & CARROLL, LLP  
Attorneys for Defendant

18 BY: ADAM L. GILL  
19  
20  
21  
22  
23  
24  
25

1 (Case called)

2 THE COURT: This is Judge Woods. Let me begin by  
3 taking the parties' appearances. First, who is on the line for  
4 plaintiff?

5 MR. KUSHNER: Good morning, your Honor, Gary Kushner,  
6 Goetz Fitzpatrick, for Whitestone. Happy holiday.

7 THE COURT: Thank you. Same to you.

8 Who is on the line for defendant?

9 MR. GILL: Adam Gill for defendant Yuanda USA  
10 Corporation.

11 THE COURT: Good. Thank you very much.

12 Let me begin with just a few brief comments about the  
13 rules that I hope the parties will follow during this  
14 conference.

15 First, remember that this is a public proceeding. Any  
16 member of the public or press is welcome to join the conference  
17 at any time. The dial-in information is available on the  
18 Court's website, as you know, and I am not monitoring whether  
19 members of the public are joining the conference.

20 Second, please state your name each time that you  
21 speak during the conference. You should do that, regardless of  
22 whether or not you have spoken previously. It will help our  
23 court reporter keep a clear record of the conversation.

24 Third, please keep your phones on mute at all times  
25 except when you are addressing the Court or your adversary.

Fourth, I'm inviting our court reporter to let us know if he has any difficulty hearing or understanding anything that we say here today. If he does, and if he asks you to do something that will make it easier for him to do his job, please do it to the extent that you can.

Finally, I am ordering that there be no recording or rebroadcast of all or any part of today's conference.

Counsel, with that out of the way, let me turn to the substance of today's conference.

I scheduled this conference to take up both the motion for judgment on the pleadings filed by defendant Yuanda USA Corporation ("Yuanda"), as well as the motion for summary judgment filed by plaintiff Whitestone Construction Corp. ("Whitestone"). Let me begin with a brief procedural history. Plaintiff filed its complaint on February 25, 2020. Docket Nos. 1, 4 ("Compl."). On September 24, I entered the parties' stipulation dismissing three of the complaints' original four counts -- leaving only plaintiff's claim for breach of contract. Docket No. 62. Defendant filed a motion for judgment on the pleadings on September 25, 2020 (the "motion for judgment on the pleadings"). Docket No. 64. Plaintiff filed its opposition to that motion on October 9, 2020 (the "opposition"). Docket No. 69. Defendant filed its reply on October 16, 2020 (the "reply"). Docket No. 70.

Fast on the heels of the motion for judgment on the

1 pleadings filed by defendant, plaintiff filed a motion for  
2 partial summary judgment. Docket Nos. 71, 72. In response to  
3 that motion, defendant submitted an opposition pursuant to Rule  
4 56(d) on November 23, 2020. Docket No. 79 (the "Rule 56  
5 opposition"). Plaintiff filed its reply to this motion last  
6 week, on December 15, 2020. Docket No. 83 (the "Rule 56  
7 reply").

8 Counsel, I have reviewed the parties' submissions. I  
9 believe I have a clear view regarding the issues presented  
10 there. That said, if there is anything that either party would  
11 like to add to your written submissions now, I'll permit you to  
12 do so. Again, I have reviewed all of the documents submitted  
13 in support of the motions already.

14 First, let me turn to counsel for plaintiff. Anything  
15 that you'd like to add to your written submissions in  
16 connection with either motion?

17 MR. KUSHNER: No. Thank you, your Honor.

18 THE COURT: Counsel for defendant.

19 MR. GILL: No. We have nothing to add.

20 Let me ask you to place your phones on mute, if you  
21 would, please. I am going to rule on each of these motions  
22 orally.

23 For the reasons that follow, defendant's motion for  
24 judgment on the pleadings is denied. The complaint adequately  
25 pleads a breach of contract, and I do not accept defendant's

invitation to look outside of the four corners of the contract, and documents integral to it, or incorporated into it by reference in order to decide the motion. I am also denying plaintiff's motion for summary judgment. Simply put, plaintiff's notion for summary judgment brought relatively early in the discovery period, is premature.

The parties are familiar with the underlying facts and procedural history. Therefore, I will not recite those in detail. To the extent that any of the facts alleged in the complaint are pertinent to my decision, those facts are embedded in my analysis.

The same is true with respect to the motion for summary judgment.

I. Motion for judgment on the pleadings.

Plaintiff's complaint currently pleads a single cause of action for breach of contract, which is the subject of defendant's motion for judgment on the pleadings. In its motion, defendant asserts that the complaint does not adequately plead a breach of contract because plaintiff has not adequately pleaded that a condition precedent to its claim has been satisfied. Defendant's motion also relies heavily on an argument that the Court should dismiss plaintiff's claim because "it is not plausible that Whitestone rejected Yuanda's work." Motion for judgment on the pleadings at 10.

Defendant's motion must be denied -- it asks me to do two

1 things that I cannot do in the context of a motion to dismiss:  
2 Draw inferences in favor of the movant, and to make  
3 determinations regarding facts under the guise of an assessment  
4 of the plausibility of the allegations.

5 A. Legal standard.

6 i. Rule 12(c).

7 A complaint must contain "a short and plain statement  
8 of the claim showing that the pleader is entitled to relief."  
9 Federal Rule of Civil Procedure 8(a)(2). "After the pleadings  
10 are closed -- but early enough not to delay trial -- a party  
11 may move for judgment on the pleadings." Federal Rule of Civil  
12 Procedure 12. "The standard for granting a Rule 12(c) motion  
13 for judgment on the pleadings is identical to that [for  
14 granting] a Rule 12(b)(6) motion for failure to state a claim."  
15 *Lynch v. City of New York*, 952 F.3d 67, 75 (2d Cir. 2020)  
16 (quoting *Patel v. Contemporary Classics*, 259 F.3d 123, 126 (2d  
17 Cir. 2001)). In evaluating a motion to dismiss pursuant to  
18 Rule 12(b)(6) or a motion for judgment on the pleadings  
19 pursuant to Rule 12(c), a Court must accept all facts set forth  
20 in the complaint as true and draw all reasonable inferences in  
21 favor of the plaintiff. See *Vega v. Hempstead Union Free*  
22 *School District*, 801 F.3d 72, 78 (2d Cir. 2015). To survive  
23 either motion, a plaintiff's complaint "must contain sufficient  
24 factual matter, accepted as true, to state a claim to relief  
25 that is plausible on its face." *WC Capital Management, LLC v.*

1 UBS Secs., LLC, 711 F.3d 322, 328 (2d Cir. 2013) (quoting  
2 *Johnson v. Rowley*, 569 F.3d 40, 44 (2d Cir. 2009)). A claim is  
3 facially plausible when a plaintiff "pleads factual content  
4 that allows the Court to draw the reasonable inference that the  
5 defendant is liable for the misconduct alleged." *Ashcroft v.*  
6 *Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic v.*  
7 *Twombly*, 550 U.S. 544, 556 (2007)).

8 "To survive dismissal, the plaintiff must provide the  
9 grounds upon which his claim rests through factual allegations  
10 sufficient to 'to raise a right to relief about the speculative  
11 level.'" *ATSI Communications, Inc. v. Shaar Fund, Ltd.*, 493  
12 F.3d 87, 98 (2d Cir. 2007) (quoting *Twombly*, 550 U.S. at 544).  
13 Although Rule 8 "does not require 'detailed factual  
14 allegations,'... it demands more than an unadorned  
15 the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556  
16 U.S. at 668. "A pleading that offers 'labels and conclusions'  
17 or 'a formulaic recitation of the elements of a cause of action  
18 will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).  
19 Determining whether a complaint states a plausible claim is a  
20 "context-specific task that requires the reviewing court to  
21 draw on its judicial experience and common sense." *Id.* at 679.  
22 However, the Court "may not weigh the evidence in the guise of  
23 a plausibility analysis." *In re Aluminum Warehousing Antitrust*  
24 *Litig.*, 95 F.Supp.3d, 419, 437 (S.D.N.Y. 2015).

25 When deciding a motion to dismiss, "a court may

1 consider only the complaint, any written instrument attached to  
2 the complaint as an exhibit, any statements or documents  
3 incorporated in it by reference, and any document upon which  
4 the complaint heavily relies." *In re Thelen LLP*, 736 F.3d 213,  
5 219 (2d Cir. 2013).

6 ii. Rule 9(c)

7 The parties do not address F.R.C.P. 9(c), which  
8 establishes the pleading standard for pleading conditions  
9 precedent. The rule provides -- let me ask you to please place  
10 your phones on mute. I am hearing some background noise.

11 The rule provides: "In pleading conditions precedent,  
12 it suffices to allege generally that all conditions precedent  
13 have occurred or been performed. But when denying that a  
14 condition precedent has occurred or been performed, a party  
15 must do so with particularity." Federal Rule of Civil  
16 Procedure 9. The prevailing view among the district courts in  
17 this circuit is that Rule 9 permits plaintiffs to do what the  
18 rule says -- plead satisfaction of contractual provisions in  
19 generality, without the need to comply with the strictures of  
20 *Iqbal* and *Twombly*. See *Dervan v. Gordian Group LLC*, 2017 WL  
21 819494, at \*4 (S.D.N.Y. Feb. 28, 2017) (collecting cases). And  
22 the two circuit courts to rule on the issue have reached that  
23 conclusion. See *Hildebrand v. Allegheny County*, 757 F.3d 99,  
24 112 (3d Cir. 2014) (under Rule 9(c), "the pleading of  
25 conditions precedent falls outside the stricture of *Iqbal* and

1 Twombly."); *Myers v. Central Florida Invs., Inc.*, 592 F.3d  
2 1201, 1224 (11th Cir. 2010) (post *Iqbal/Twombly* decision  
3 concluding that plaintiff's "general statement" that she had  
4 "fulfilled all conditions precedent to institution of this  
5 action" was "sufficient to discharge her duty under Rule 9 of  
6 the Federal Rules of Civil Procedure"). If those circuit  
7 courts have the right answer, this motion is very easy -- the  
8 complaint alleges satisfaction of the conditions precedent in  
9 generality. See complaint at paragraph 33. However, in  
10 *Dervan*, Judge Nathan conducted a considered analysis of Rule  
11 9(c) and concluded that the plausibility requirements of *Iqbal*  
12 and *Twombly* apply to the pleading of conditions precedent under  
13 Rule 9(c). *Dervan*, 2017 WL 819494 at \*5 ("The Court sees no  
14 principled basis on which to afford Rule 9(c) -- an adjacent  
15 subsection whose structure substantially mirrors that of Rule  
16 9(b) -- a divergent reading. Like Rule 9(b), Rule 9(c) employs  
17 the word 'generally' in one sentence as a point of  
18 differentiation from a 'particularity' requirement set forth in  
19 that sentence's immediate neighbor. Put differently,  
20 'generally' is used in Rule 9(c) as a 'relative term,' serving  
21 to exempt allegations that conditions precedent have been  
22 performed not from the baseline plausibility requirement of  
23 Rule 8(a), but rather only from the "elevated" standard for  
24 denials of such performance established in the second half the  
25 of the rule."). Since *Dervan* was decided, two of my colleagues

1 in this district have adopted Judge Nathan's view. See  
2 *Comerica Leasing Corp. v. Bombardier, Inc.*, 2019 WL 11027701,  
3 at \*8 (S.D.N.Y. Sept. 30, 2019); *O.F.I. Imports, Inc. v.*  
4 *General Electric Capital Corp.*, 2017 WL 3084981, at \*5  
5 (S.D.N.Y. July 20, 2017).

6 For purposes of this motion, I am employing the more  
7 rigorous standard described by Judge Nathan without holding  
8 that her approach, which is inconsistent with the views of two  
9 circuit courts, is correct. Because I conclude that  
10 plaintiff's complaint is adequately pleaded under the more  
11 stringent standard, I do not need to decide whether the lower  
12 pleading standard would apply.

13 However, it is unquestionable that defendant's answer  
14 failed to meet the pleading standard required by Rule 9(c).  
15 See docket No. 39. To deny that a condition precedent has  
16 occurred or been performed, defendant must do so with  
17 particularity. I am taking up this motion notwithstanding  
18 defendant's acknowledged failure to adequately plead this  
19 defense. To do otherwise would elevate form over substance. I  
20 will permit defendant to amend its answer to add this defense,  
21 as defendant has requested in its reply.

22 B. Breach of contract claim.

23 The contract is governed by New York law. See docket  
24 No. 4-1 at ECF page 10. Under New York law, the "fundamental,  
25 neutral precept of contract interpretation is that agreements

1 are construed in accord with the parties' intent." *Greenfield*  
2 *v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002). "The best  
3 evidence of what parties to a written agreement intend is what  
4 they say in their writing." *Id.* (internal quotation marks  
5 omitted). "Thus, a written agreement that is complete, clear,  
6 and unambiguous on its face must be [interpreted] according to  
7 the plain meaning of its terms." *Id.*; see also *South Road*  
8 *Associates, LLC v. IBM*, 4 N.Y.3d 272, 277 (2005). ("In cases  
9 of contract interpretation, it is well settled that when  
10 parties set down their agreements in a clear complete document,  
11 their writing should... be enforced according to its terms."  
12 (internal quotation marks omitted)).

13 "In a dispute over the meaning of a contract, the  
14 threshold question is whether the ambiguous." *Lockheed Martin*  
15 *Corp. v. Retail Holdings, N.V.*, 639 F.3d 63, 69 (2d Cir. 2011)  
16 (quoting *Krumme v. WestPoint Stevens Inc.*, 238 F.3d 133, 138  
17 (2d Cir. 2000)). The question of "whether or not a writing is  
18 ambiguous is a question of law to be resolved by the courts."  
19 *W.W.W. Associates, Inc. v. Giancontieri*, 77 N.Y.2d 157, 162  
20 (1990) (citation omitted). "It is well settled that a contract  
21 is unambiguous if the language it uses has a definite and  
22 precise meaning, as to which there is no reasonable basis for a  
23 difference of opinion. Conversely, ... the language of a  
24 contract is ambiguous if it is capable of more than one meaning  
25 when viewed objectively by reasonably intelligent person who

1 has examined the context of the entire integrated agreement."

2 *Lockheed Martin Corp.*, 639 F.3d, at 69 (citations omitted).

3 "'Ambiguity is determined by looking within the four  
4 corners of the document, not to outside sources.'" *JA Apparel*  
5 *Corp. v. Abboud*, 568 F.3d 390, 396 (2d Cir. 2009) (quoting *Kass*  
6 *v. Kass*, 91 N.Y.2d, 554, 566 (1998)). "It is well settled that  
7 extrinsic and parol evidence is not admissible to create an  
8 ambiguity in a written agreement which is complete and clear  
9 and unambiguous upon its face'" *W.W.W. Associates*, 77 N.Y.2d at  
10 163 (quoting *Intercontinental Planning v. Daystrom, Inc.*, 24  
11 N.Y.2d 372, 379 (1969)). "An analysis that begins with  
12 consideration of extrinsic evidence of what the parties meant,  
13 instead of looking first to what they said and reaching  
14 extrinsic evidence only when required to do so because of some  
15 identified ambiguity, unnecessarily denigrates the contract and  
16 unsettles the law." *Id.* "Before looking to evidence of what  
17 was in the parties' minds, a court must give due weight to what  
18 was in their contract." *Id.* at 162. "Parol evidence --  
19 evidence outside the four corners of the document -- is  
20 admissible only if a court finds an ambiguity in the contract.  
21 As a general rule, extrinsic evidence is inadmissible to alter  
22 or add a provision to a written agreement." *Schron v. Troutman*  
23 *Sanders LLP*, 20 N.Y.3d, 430, 436 (2013).

24 Under New York law, the elements of a breach of  
25 contract claim are (1) the existence of a contract, (2)

1 performance by the party seeking recovery, (3) breach by the  
2 other party, and (4) damages suffered as a result of the  
3 breach. See *Johnson v. Nextel Communications, Inc.*, 660 F.3d  
4 131, 142 (2d Cir. 2011). "Under New York law, damages for  
5 breach of contract should put the plaintiff in the same  
6 economic position he would have occupied had the breaching  
7 party performed the contract." *Oscar Gruss & Son v. Hollander*,  
8 337 F.3d 186, 196 (2d Cir. 2003).

9 I. Discussion

10 1. Satisfaction of the condition precedent is  
11 adequately pleaded.

12 Defendant does not challenge the sufficiency of the  
13 complaint's allegations as they relate to most of the elements  
14 of the breach of contract claim. The motion focuses on an  
15 argument that plaintiff has failed to allege the satisfaction  
16 of a condition precedent to defendant's obligations under the  
17 parties' contract.

18 The contract that is the subject of the  
19 breach-of-contract claim is the purchase order attached as  
20 Exhibit A to the complaint. Docket No. 4-1. The provision of  
21 the contract at the heart of this dispute is Section 10. The  
22 contract defines Whitestone as "subcontractor," and Yuanda as  
23 "vendor." Section 10 of the contract provides in pertinent  
24 part:

25 Inspection and defective work: (a) without any duty

1 of subcontractor to vendor to provide continuous or exhaustive  
2 inspections, the subcontractor may inspect vendor's work for  
3 compliance with this purchase order or the contract documents,  
4 whether at the project site or at any other place where items  
5 or services for such vendor's work, or documents may be in  
6 preparation, manufacture, storage, or installation. Vendor  
7 shall promptly prepare the plan for the approval of the  
8 subcontractor in order to replace or correct any vendor's work,  
9 which subcontractor shall reject as failing to conform to the  
10 requirements of this purchase order and/or contract documents,  
11 whether rejected before or after installation .... Upon  
12 approval of vendor's plan by subcontractor, Vendor shall  
13 promptly replace or correct any vendor's work. If vendor does  
14 not do so within a reasonable time, subcontractors shall have  
15 the right to do so and vendor shall be liable to subcontractor  
16 for the cost thereof.

17 In its motion, defendant argues that the complaint  
18 does not adequately allege that plaintiff has rejected  
19 defendant's work "as failing to confirm to the requirements" of  
20 the contract.

21 Plaintiff has adequately pleaded that it rejected the  
22 work as nonconforming. Paragraph 24 of the complaint states  
23 that "Whitestone contacted Yuanda and declared Yuanda's WT-3  
24 Clerestory system work nonconforming and demanded that Yuanda  
25 remediate the nonconforming WT-3 Clerestory work, pursuant to

1 its contract." Drawing all inferences in favor of the  
2 nonmoving party, as I must in this context, these facts  
3 adequately plead satisfaction of the condition precedent.  
4 Plaintiff alleges it declared the system nonconforming -- which  
5 is pretty much a synonym to "failing to conform to the  
6 requirements" of the contract.

7 And the complaint adequately pleads that the work was  
8 rejected. Plaintiff pleaded that it declared the work as  
9 nonconforming and demanded remediation. The complaint does not  
10 use the word "reject" -- but it does not take a dramatic leap  
11 of inference to read a buyer telling its vendor that the work  
12 product isn't up to standard and that they must fix it, as a  
13 rejection. To the extent that defendant's motion rests on a  
14 strained semantic distinction between the word "reject" and the  
15 words used in paragraph 24 of the complaint, it is profoundly  
16 flawed. There is no question that this section of the  
17 complaint put defendant on notice, and in the context of a  
18 motion in which I am to draw inferences in favor of the  
19 nonmoving party, slight semantic distinctions do not justify  
20 dismissal of a cause of action when the meaning is clear.

21 Much of defendant's motion rests on an invitation to  
22 do something that I cannot do in this context of a motion for  
23 judgment on the pleadings -- to evaluate the credibility of  
24 plaintiff's allegations and to reject them as incredible under  
25 the guise of a plausibility analysis. Defendant wants me to

1 accept that plaintiff did not reject the work as nonconforming,  
2 but that it only rejected the work at the direction of a third  
3 party, with whose conclusion regarding the nonconformity of the  
4 products plaintiff disagrees. Defendant's reply lays bare in  
5 strategy: "Yuanda brought to this Court's attention  
6 Whitestone's pleading in its state court action against Sciame  
7 for purposes of demonstrating that Whitestone cannot plausibly  
8 plead satisfaction of the condition precedent. That is,  
9 Whitestone cannot truthfully plead in this action that Yuanda's  
10 work failed to 'conform to the requirements of this purchase  
11 order and/or contract documents' when Whitestone has pleaded  
12 the contrary in a separate action under oath." Reply at 10.

13 But it is a first principle that the Court accepts as  
14 true statements by a plaintiff in a complaint. The Second  
15 Circuit has held that "in deciding Rule 12(c) motions ... the  
16 same standard applicable to Rule 12(b)(6) motions to dismiss  
17 [is employed, that is], "accepting all factual allegations in  
18 the complaint as true and drawing all reasonable inferences in  
19 [the nonmoving party's] favor'" *Vega*, 801 F.3d at 78 (quoting  
20 *L-7 Designs, Inc., v. Old Navy, LLC*, 647 F.3d 419, 429 (2d Cir.  
21 2011) (all alterations except the second in original)). Even  
22 in the most extreme scenario -- assuming that what plaintiff  
23 has pleaded in this case is the opposite of what it has  
24 asserted in another case -- that fact is irrelevant to my  
25 analysis. I accept the facts pleaded here as true. I cannot

1 engage in an assessment of the credibility of plaintiff's  
2 position or otherwise "weigh the evidence in the guise of a  
3 plausibility analysis." *Aluminum Warehousing*, 95 F.Supp.3d at  
4 437. Because defendant's motion expressly asks me to do just  
5 that, it fails.

6 II. Motion for summary judgment

7 Discovery in this case is ongoing. I entered the  
8 governing case management plan and scheduling order on  
9 September 3, 2020. Docket No. 53. Pursuant to it, fact  
10 discovery is to be completed by February 1, 2021, and expert  
11 discovery is to be completed by March 18, 2021. According to  
12 the case management plan, summary judgment motions are not due  
13 until April 18, 2021. Less than a month after the entry of the  
14 governing case management plan and scheduling order, and four  
15 months prior to the end of fact discovery, plaintiff sought to  
16 leave to file this motion for summary judgment. See docket  
17 Nos. 65, 68. The motion itself was filed approximately a month  
18 later, on November 9, 2020. Docket No. 71; see docket No. 72.  
19 At this point, the close of fact discovery is still over a  
20 month away.

21 Plaintiff's motion argues that summary judgment should  
22 be granted with regard to its breach of contract claim. See  
23 plaintiff's memorandum of law, docket No. 73 ("memorandum of  
24 law"). The argument presented by plaintiff is also based  
25 largely on Section 10 -- the provision of the contract that I

discussed previously. Plaintiff also points to paragraph 2 of the contract, which states, among other things, the following:

"Other agreements incorporated by reference... vendor shall assume toward subcontractor all obligations and responsibilities which, under the contract documents as set forth in Whitestone purchase order attachment B related to curtain wall pertaining to the prime contract, subcontractor assumed toward contractor and owner and architect/engineer and shall be bound by the rulings of [Whitestone], [Sciame], and owner and architect/engineer."

Docket No. 4-1 at ECF page 4.

At its core, plaintiff's argument is that it was required under the terms of its prime contract to accept decisions about the quality of its work by the prime contractor -- Sciame, and its architect. Sciame rejected the clerestory work as nonconforming, so plaintiff notified defendant of the rejection pursuant to paragraph 10 of the contract. As a result, plaintiff argues, Yuanda is obligated to remediate the rejected work.

Defendant opposes summary judgment on the basis of Federal Rule of Civil Procedure 56(d) ("Rule 56(d)"). It argues that the parties have not yet completed discovery and that defendant does not yet have the facts necessary to oppose the motion. I agree with that ultimate conclusion, although I

1 do not adopt all aspects of defendant's arguments in reaching  
2 that conclusion. Therefore, plaintiff's motion for summary  
3 judgment is denied under Rule 56(d), and, as a result, I do not  
4 reach the merits of the motion.

5 A. Legal standard for denial of a summary judgment  
6 motion under Rule 56(d).

7 If the party opposing a summary judgment motion "shows  
8 by affidavit or declaration that, for specific reasons, it  
9 cannot present facts essential to justify its opposition, the  
10 Court may" deny the motion, allow time to take discovery, or  
11 issue any other appropriate order. Federal Rule of Civil  
12 Procedure 56(d). A party resisting summary judgment on the  
13 ground that it needs additional discovery in order to defeat  
14 the motion must submit an affidavit pursuant to Federal Rule of  
15 Civil Procedure 56(d) (formerly Rule 56(f)), showing: "(1)  
16 what facts are sought and how they are to be determined, (2)  
17 how those facts are reasonably expected to create a genuine  
18 issue of material fact, (3) what effort affiant has taken to  
19 obtain them and (4) why the affiant was unsuccessful in those  
20 efforts." *Meloff v. N.Y. Life Insurance Company*, 51 F.3d, 372,  
21 375 (2d Cir. 1995) (quoting *Hudson River Sloop Clearwater,*  
22 *Inc., v. Department of Navy*, 891 F.2d 414, 422 (2d Cir. 1989)).  
23 "Only in the rarest of cases may summary judgment be granted  
24 against a plaintiff who has not been afforded the opportunity  
25 to conduct discovery." *Miller v. Wolpoff & Abramson L.L.P.*,

1 321 F.3d 292, 303-04 (2d Cir. 2003).

2 "The nonmoving party must have had the opportunity to  
3 discover information that is essential to his opposition to the  
4 motion for summary judgment." *Trebor Sportswear Co., Inc. v.*  
5 *The Limited Stores, Inc.*, 865 F.2d 506, 511 (2d Cir. 1989).  
6 The grant of relief pursuant to Rule 56(d) is within the  
7 discretion of the district court. *Continental Case Company v.*  
8 *Marshall Granger & Company, LLP*, 921 F.Supp.2d 111, 126-27  
9 (S.D.N.Y. 2013).

10 B. Discussion

11 Summary judgment is premature. This is not the  
12 "rarest of cases," as contemplated by the Second Circuit in  
13 *Miller*, 321 F.3d at 303-04. In my judgment, it would be  
14 inappropriate to take up this motion for summary judgment,  
15 given that defendant had not been afforded an adequate  
16 opportunity to conduct discovery at the time that the motion  
17 was filed. *Id.*

18 Defendant's opposition, including Mr. Gill's affidavit  
19 submitted in support of it, satisfies the requirements of Rule  
20 56(d) to submit a declaration or affidavit establishing "(1)  
21 what facts are sought and how they are to be obtained, (2) how  
22 such facts are reasonably expected to raise a genuine issue of  
23 material fact, (3) what efforts the affiant has made to obtain  
24 them, and (4) why the affiant's efforts were unsuccessful."  
25 *Gualandi v. Adams*, 385 F.3d 236, 244 (2d Cir. 2004).

1 I. Defendant has shown what facts are sought and how  
2 they are to be obtained.

3 First, the defendant has shown what facts are sought  
4 and how they are to be obtained. This element is easily met  
5 because defendant points to discovery requests that had not  
6 been fully responded to at the time of the motion. Defendant  
7 describes incomplete discovery responses and a desire to  
8 complete depositions, in particular a 30(b)(6) deposition of  
9 plaintiff's principal affiant, Mr. Grzic. Affidavit of Adam  
10 Gill, docket No. 79-1 ("Rule 56 affidavit"). The Rule 56  
11 affidavit and the supporting materials describe a large volume  
12 of areas of inquiry that defendant seeks to explore. As I will  
13 say in the next section, I am not opining now that all of those  
14 topics are reasonably expected to raise a genuine issue of  
15 material fact. In any event, this first factor is satisfied --  
16 defendant's affidavit describes the information that is sought  
17 and how it seeks to obtain that information.

18 Ii. Plaintiff has shown how such facts are reasonably  
19 expected to raise a genuine issue of material fact.

20 Second, defendant has shown how some of the facts that  
21 they wish to develop through the completion of discovery are  
22 reasonably expected to raise a genuine issue of material fact.  
23 At the outset, it is undisputed that discovery on the issue of  
24 damages is warranted. See Rule 56 reply at 12. The motion  
25 itself is limited to the issue of liability. So, regardless of

1 what happens with this motion, discovery proceeds.

2 And defendant has shown that "discovery is needed into  
3 whether Sciame rejected work Yuanda provided to Whitestone, or  
4 whether the work was solely the product of Whitestone." Rule  
5 56 opposition at 8. Yuanda argues that "while Whitestone's  
6 motion and supporting statement of fact assert that Yuanda was  
7 responsible for installation, the language of the purchase  
8 order clearly indicates the opposite -- Yuanda was a supplier  
9 of materials for this project." *Id.* This is a legitimate issue  
10 that might raise a material issue of fact -- if the work  
11 rejected was not "vendor's work" as defined in the contract,  
12 Whitestone would have a reasonable argument that the  
13 contractual obligation did not apply to it and that it is not  
14 liable.

15 I highlight that I am not relying on many of the  
16 arguments raised by defendant here. I agree with counsel for  
17 plaintiff that many of the issues raised seem to seek extrinsic  
18 evidence related to the relevant contracts and their  
19 interpretation. Absent an argument regarding the ambiguity of  
20 the governing contract, which has not been presented to me, I  
21 would not look to extrinsic evidence to construe their terms.  
22 Similarly, I do not now embrace the argument that discovery  
23 regarding whether "Whitestone, as opposed to a third party,  
24 rejected Yuanda's work -- if Whitestone did not reject Yuanda's  
25 work, its motion must fail." Rule 56 affidavit at 8. I do not

1 see a textual basis to conclude that the contract bars  
2 Whitestone from rejecting nonconforming work based on the  
3 determination of a third party. I do not need to take a  
4 position on these issues now to resolve this motion --  
5 defendant has identified a substantial issue that could give  
6 rise to a disputed issue of material fact. That is sufficient  
7 for it to satisfy this factor.

8           iii. Defendant has demonstrated what efforts it made  
9 to obtain the requested discovery and why its efforts were  
10 unsuccessful.

11           With respect to the third and fourth factors,  
12 defendant has shown what efforts it took to obtain the  
13 discovery and why it is that the efforts were unsuccessful.  
14 The procedural history of this case makes this point very  
15 clear -- defendant has not been successful in obtaining all  
16 discovery because the discovery period has not yet expired, and  
17 because it appears the discovery process has bogged down in  
18 disputes.

19           At the time that this motion was filed, three months  
20 remained in the fact discovery period. So, frankly, I would  
21 not expect that defendant would have had sufficient time to  
22 complete the work necessary to develop its defenses. I  
23 understand that two sets of production were made on Yuanda in  
24 October of this year. Yuanda asserts that the productions were  
25 inadequate and that, among other things, plaintiff withheld

1 swaths of responsive documents. Rule 56 affidavit at 10-11.  
2 Defendant notified plaintiff of discovery deficiencies in early  
3 November, which were the subject of a meet-and-confer session  
4 that was held on November 23, 2020. *Id.* As of the date of the  
5 Rule 56 affidavit, those disputes had not been resolved.

6 On September 16, 2020, counsel for defendant noticed  
7 the deposition of plaintiff's 30(b)(6) witness. But because of  
8 discovery disputes, counsel for defendant delayed completion of  
9 that deposition. *Id.* at 12. Defendant asserts that it will be  
10 able to respond substantively to the Rule 56 motion after it  
11 has completed that deposition.

12 Defendant has shown why its efforts to obtain the  
13 discovery it needs have been unsuccessful. The parties had  
14 only been working to complete discovery under the current case  
15 management plan for a short time when the motion was filed.  
16 Defendant was unreasonable in obtaining the discovery at the  
17 time that the summary judgment motion was filed because the  
18 motion was filed prematurely. To be very clear, I am not  
19 concluding now that in the months since the motion was filed  
20 that defendant has acted diligently in its pursuit of  
21 discovery. But defendant has met its burden under the third  
22 and fourth prongs of the test and therefore meets the standard  
23 for a Rule 56(d) challenge.

24 Because necessary discovery is still outstanding, and  
25 even more discovery was outstanding at the time defendant filed

1 its opposition, defendant could not present facts essential to  
2 justify its opposition to plaintiff's summary judgment motion.  
3 Therefore, plaintiff's motion for summary judgment is denied  
4 under Rule 56(d).

5 As a note, although I previously ordered that I would  
6 set a briefing schedule on the substance of plaintiff's motion  
7 after resolving the Rule 56(d) challenge, I am exercising my  
8 discretion to deny the motion entirely, rather than to hold it  
9 in abeyance or to defer its consideration, because I believe  
10 that the parties should brief the motion with the benefit of  
11 all of the facts, not just the snapshot of facts that were  
12 available at the time that plaintiff filed the motion. After  
13 discovery is completed, it may well be that the issues are  
14 potentially capable of resolution on summary judgment will be  
15 narrowed. It will be most efficient for the Court and the  
16 parties to evaluate a motion that is based on a complete  
17 factual record.

18 I emphasize, again, the words of the Second Circuit:  
19 "Only in the rarest of cases may summary judgment be granted  
20 against a plaintiff who has not been afforded the opportunity  
21 to conduct discovery." *Miller v. Wolpoff & Abramson L.L.P.*,  
22 321 F.3d 292, 303-04 (2d Cir. 2003).

### 23 III. Conclusion

24 For the foregoing reasons, defendant's motion for  
25 judgment on the pleadings is denied in its entirety.

1 Plaintiff's motion for summary judgment is also denied. I will  
2 enter a separate order denying both of the motions, referring  
3 to the transcript of today's conference for the basis for my  
4 decision.

5 Thank you very much, counsel, for your patience as I  
6 got through that decision. I saw that the motions were fully  
7 briefed, and I thought that they would be capable of early  
8 resolution. I had planned to resolve the motion to dismiss  
9 during the conference that was adjourned at the parties'  
10 request.

11 Now, two issues that I think I should discuss with the  
12 parties, based on this set of conversations.

13 First, counsel for defendant, I've granted your  
14 request to amend the answer to plead with particularity your  
15 defense related to the faulty condition precedent. I would  
16 like to set a deadline by which that amendment will be filed.  
17 By when would you propose to file your amended answer?

18 MR. GILL: Normally, I would say that could be done  
19 pretty quickly, within no more than 14 days. But with the  
20 holidays and with the Court's indulgence, that puts us right  
21 after the first of the year. If we can have until the end of  
22 that first week of January, which is not quite three weeks. It  
23 would be --

24 THE COURT: You are saying January 8. Thank you.

25 Counsel for plaintiff, any concern?

1 MR. KUSHNER: I have no objection to the time request  
2 of Mr. Gill.

3 I do have a question of the Court regarding the scope  
4 of the amendment and ask specifically if it's limited to  
5 pleading the condition precedent.

6 THE COURT: Thank you.

7 Yes, it is limited to pleading the condition  
8 precedent. No good cause has been shown for an amendment for  
9 any other purpose. I determined that there is sufficient  
10 justification, particularly in light of my decision on the  
11 motion, to permit them to add this as a defense. But the scope  
12 of the amendment is limited to adding that as a defense. I  
13 understand that they expected to add this as a defense but  
14 inadvertently omitted it. I am going to grant them leave, but  
15 only to address that one item in the pleading.

16 Counsel for defendant, your amendment is due no later  
17 than January 8.

18 The other issue that I think I should take up now,  
19 having reviewed your submissions, are issues related to  
20 discovery.

21 Counsel for plaintiff has raised I think legitimate  
22 questions. I had some questions as I reviewed the affidavit.  
23 The parties, I think, remember our conversations earlier about  
24 the nature of the deadlines in the case management plan and  
25 scheduling order. At this point I understand that there are no

1 issues that require the Court's intervention and that the  
2 parties expect to complete discovery by the existing deadline,  
3 given the issues described in the affidavit. My hope would be,  
4 if that's the case, the issues that are described there have  
5 been developed substantially so that you can be on track to  
6 complete that work.

7 Let me just take a few moments to talk with the  
8 parties about that question. My expectation is that the  
9 parties will meet the deadlines in the case management plan and  
10 scheduling order. But based on what's included in the  
11 affidavit, I think it's worthwhile for us to begin a  
12 conversation about where you are. Let me hear first from you,  
13 if I can, counsel for defendants.

14 MR. GILL: Yes. I do anticipate, based on what I said  
15 in the affidavit and what I know, to complete all discovery by  
16 the deadline, February 1.

17 The statements I made in the affidavit were what I  
18 knew at the time, and they have not changed, except that I  
19 anticipated that the affiant, Mr. Grzic, would be the corporate  
20 designee, that I was informed by opposing counsel that it would  
21 be a different person. I don't think that changes my answer.

22 I do think I would need -- depending on how the  
23 deposition of the corporate designee comes out, I would just  
24 need the deposition of the designee and possibly Mr. Grzic.

25 And opposing counsel, obviously, he will answer for

1 himself, but he has indicated to me he only wants to take or at  
2 this point indicating the deposition of Yuanda's corporate  
3 designee. He has not indicated another deponent.

4 I see no reason why we could not complete by the  
5 deadline set forth in the current schedule.

6 THE COURT: Good. I'm happy to hear that.

7 Counsel for plaintiff, anything else to discuss on  
8 this topic before we adjourn?

9 MR. KUSHNER: Nothing on discovery. I don't think  
10 that the limited amendment would cause any need to put out  
11 dates. But if there is something that's alleged in this  
12 amended pleading that requires an additional document request,  
13 I would ask the Court to have responses on short notice to  
14 those rather than the full term under the federal rules. I  
15 think turnaround time, basically, if they haven't been  
16 produced, can be done within ten days. So, therefore, that  
17 would give us the opportunity to take those depositions before  
18 the discovery deadline.

19 I do have another request for clarification on another  
20 issue.

21 THE COURT: That's fine. Please go ahead, counsel.

22 MR. KUSHNER: With respect to the Court's denial of  
23 the summary judgment motion, I think it's pretty clear. But  
24 can I inquire, it's without prejudice to a future motion for  
25 summary judgment on behalf of the plaintiff against the

1 defendant after the record is complete with discovery. Is that  
2 correct?

3 THE COURT: Yes, that's correct. Thank you.

4 Thank you, all. I appreciate your patience. This  
5 proceeding is adjourned.

6 (Adjourned)  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25